In the United States Circuit Court of Appeals For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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I.

At p. 6 the Government attempts to answer the clear-cut proposition made at p. 11 of the opening brief that "the uncontradicted record and evidence affirmatively show that Burns fully complied with the terms of his bond, and that no default was made."

In the opening brief (pp. 11-13) it was shown that the bail bond covered a violation of the N. P. A. on November 21, 1924. It was further shown that the charge actually brought against Burns was for seven different offenses, commencing with certain offenses on October 24, and running down to November 8, 1924; all of these offenses being separate and distinct offenses. It was further shown that Burns appeared and pleaded guilty to two of the counts in the information, covering crimes alleged to have been committed on October 16 and October 24, 1924, respectively; that at that time the rest of the charges were dismissed, so that on the date on which the forfeiture was alleged to have taken place, to-wit: September 8, 1925, all the charges covered by the bond had been dismissed, and that there was no charge then pending against said Burns, which was covered by the bond.

To meet this situation the Government contends (p. 6) that there was no objection to the introduction of the bail bond in evidence; that, therefore, the variance between the bond and the information was waived.

Obviously this contention is unsound. The bail bond was offered before the information was placed in evidence. At the time the bond was introduced the defendant had a right to assume that the plaintiff in-

tended to later introduce an information which would cover the conditions of the bond, and would show a violation of the conditions of the bond. The objection would not be to the bail bond, but would be to the proof of the information, or the proof of the default. Moreover, the information was not introduced by the Government, but was introduced by the defendant, for the purpose of showing that there was no default at the time the alleged forfeiture took place.

At p. 7 the Government contends that bail bonds are often signed prior to the time that the indictment or information is filed; that it is thus impossible to indict or inform against the defendant on all counts and for all crimes as described in the bond. This, however, is the Government's misfortune and not the surety's. The surety contracted to deliver the defendant to answer a certain charge named in the bond; not to answer any and all charges which the Government may see fit to bring. It must be conceded, of course, that a slight or immaterial variance would not relieve the bond. But in the case at bar the acts and crimes set forth were separate and distinct crimes, complete in themselves, on entirely different days.

Moreover, we do not have here a question of variance, but simply a question of whether or not any information or crime whatsoever was pending against the defendant at the time of the forfeiture which was

covered by the bond. It has been shown that any of the crimes covered by the bond were dismissed long prior to the time that the forfeiture took place.

II.

At p. 8 the Government attempts to meet the point advanced by appellant at p. 13 of the opening brief, that "in any event the bond was discharged because the charge brought against Burns was different than the charge covered by the bond."

In the opening brief (p. 13) it was shown that the bond covered an offense committed on or about November 21; while the charge filed was for seven different, separate and distinct offenses, none of which occurred on November 21, and most of which occurred many days prior to that time. Moreover, these different offenses charged separately occurred on different days. The defendant might be guilty of one or two, but not of all the charges.

The Government contends that the bond was not released because the offenses charged are similar to the offenses charged in the bond. However, this is not true, as the bond and information, when examined, show that they relate to separate and distinct offenses committed at different times, and under different circumstances.

It is further contended by the Government, at p. 9, that the offenses all arise out of the same transaction. This is obviously not not in accordance with the record, for the reason that the offenses are of different grade and character and arose on different days, and are charged separately and distinctly.

III.

The Government again contends at pp. 8 and 9 that the failure to object to the bond waives the point here made. As already pointed out, an objection could not be made to the bond at the time it was introduced for the reason that the defendant had a right to assume that the Government intended to offer in support of its case, an information in accordance with the terms of the bond; or to offer a breach in accordance with the terms of the bond. Until the information and the acts constituting the breach were presented by the Government it would be impossible to say whether or not a fatal variance had occurred. Moreover, as pointed out, the Government at no time introduced in evidence the information. The information was introduced by the defendant to prove that no charge was brought against the defendant which was covered by the bond, and which was still pending when the default occurred.

IV.

The Government contends (p. 9) that the point made by the defendant surety (p. 14 of opening brief) that "the bond was discharged for failure to call the defendant at any proper time" is not well taken for the reason that under the Washington law a "term to term" bond is not required; that the Washington statutes require the bond to be conditioned for appearance at any time.

This statement, however, is contrary to the great number of Federal cases cited at p. 15 of the opening brief.

V.

At p. 12 the Government attempts to meet the point made at p. 16 of appellant's brief that "the bail is discharged under the Washington law."

As shown, the Government contends that the Washington statute applicable to the conditions of the bond, governs in the Federal court. The Government, however, refuses to be bound by the related Washington statutes which require that the information be filed within thirty days after the arrest of the defendant, and that the defendant be brought to trial within sixty days after the information is filed.

It is fair to assume that the broad Washington statutes governing the conditions of the bond would not have been passed had it not been for the similar and related statutes placing a limit of thirty and sixty days respectively upon the power of the prosecutor to hold the defendant on a criminal charge.

The Supreme Court of the State of Washington has construed these statutes to be mandatory, and to require the prosecutor to fully comply with the thirty and sixty day rules. It has further been held by the Supreme Court of the State of Washington, in *State v. Lewis,* 35 Wash. 261, that the benefits of the thirty and sixty day statutes inure to the surety on the defendant's bond; and that the surety may insist upon those provisions for a release of his obligation. Counsel for the Government contends that *State v. Lewis* is not in point because in that case the criminal action was actually dismissed. It will be noted, however, that in *State v. Lewis* the forfeiture of the bond occurred prior to the time the criminal action was dismissed, and, therefore, the *Lewis* case is applicable to the case at bar.

We thus have a situation where the Government attempts to take advantage of the favorable statutes providing for the condition of the bond, but refuses to be bound by the following and related statutes provid-

ing that the prosecution must be had in thirty and sixty days respectively. The Government cannot accept the benefit of one statute, and reject the penalties of the other. It must take the bitter with the sweet.

Hence, the defendant surety was released under the Washington statutes, because in this case there was a failure to file the information within thirty days, and to call the defendant within sixty days.

VI.

At p. 18 of the Government's brief it is contended that the appellant did not properly except to the findings of the court. The assertion of this claim approaches bad faith on the part of the Government. Neither counsel for the Government nor for appellant ever intended the judgment to constitute findings. The judgment was prepared on a stock form by the Government, and an exception taken by the defendant.

Rule 62 of the district court provides that findings may be made under certain conditions. That rule, however, provides that the findings shall be separate and distinct from the judgment; that a request for findings must be made "on or before the submission of the cause for decision." It further provides that the findings shall be made prior to the time that the judgment is "signed and filed;" and further provides that the losing party, not the successful party, shall pre-

pare the findings; that a day shall be set for the settlement of the findings, and notice given to the parties. The record in this case utterly fails to disclose any of these steps, and, in fact, shows that no attempt was made to have findings entered. Moreover, the rule provides that in the event that the losing party fails to present findings, they shall be deemed waived and none shall be made.

It is therefore clear that this point raised by the Government is not only without any merit, but is made without even a pretense of sincerity.

VII.

Counsel for the Government contend (p. 17) that appellant has waived its right to have this court consider the insufficiency of the evidence to support the judgment, for the reason that appellant introduced evidence after its motion for a non-suit was denied and failed to renew its motion at the end of the case. In support of this contention are cited four cases:

American R. R. Co. of Porto Rico v. Santiego, 9 Fed. (2nd) 753;

Bunker Hill Mining etc. Co. v. Polak, 7 Fed. (2nd) 583;

Columbia and Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202;

Gilson v. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

We admit that the general rule announced in these cases is applicable under certain circumstances. But we most urgently call the court's attention to the fact that this general rule is not an absolute and arbitrary one. It is subject to exception; and the case presented in this appeal falls clearly within all of these exceptions.

It might be well first to consider the reason for the general rule. The principles underlying it are aptly stated in *Lancaster v. Foster,* 260 Fed. 5, at p. 6, as follows:

> "In behalf of the defendants in error it is contended that the first mentioned exception can not be availed of by the plaintiff in error because the latter thereafter introduced other evidence. A number of decisions are cited which indicate the existence of a rule to that effect. There is obviously good reason to support such a rule, where the record does not disclose the subsequently introduced evidence, or where that evidence is disclosed and it is such as to make the evidence as a whole enough to justify its submission to the jury. If the subsequently introduced evidence is not disclosed to the appellate court, it may be presumed that the plaintiff's case was strengthened by it, and that the evidence as a whole was such that an instruction to find for the defendant could not properly have been given. If any deficiency in the evidence offered by plaintiff is shown, or is to be presumed to have been supplied by the evidence offered by the defendant, the latter is in no position to complain of the court's refusal to direct a verdict in its favor. Such a position was presented in the case of *Grand*

Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 66. The bill of exceptions in that case did not show the evidence introduced by the defendant after the overruling of its motion, that a verdict in its favor be directed. It was held that under such circumstances it must be presumed that when the case was closed on both sides there was enough testimony to make it proper to leave the issues to be settled by the jury. There is no room for such a presumption where all the evidence adduced on both sides is contained in the bill of exceptions, and neither the part of it which was before the court when it refused to direct a verdict for the defendant, nor all the evidence on both sides was enough to make it proper to leave the issues to be settled by the jury.

"The evidence introduced by the defendants in the instant case had no tendency to support the claim asserted by the plaintiff, or to supply any deficiency in the evidence offered by the latter. If it was error to overrule the motion for a directed verdict when it was first made, nothing afterwards occurred to cure that error. * * * * We do not think the rule invoked is applicable where it is affirmatively made to appear that there is an absence of any good reason for applying it."

It will be readily seen that a general rule based upon such a theory must necessarily have exceptions, and cannot be arbitrarily exercised in every case. The court has so decided. In fact, this court, in the case of *Alaska Fishermen's Packing Co. v. Chin Quong,* 202 Fed. 710, recognizes such an exception. In holding that in the particular case before the court the failure to renew was fatal, Judge Gilbert said, at p. 710:

"Error is assigned to the denial of the defendant's motion for a non-suit as to the first cause of action made at the close of the plaintiff's testimony. The assignment of error is of no avail to the defendant in this court, for the reason that, after the motion for a non-suit was overruled, the defendant proceeded to take testimony upon the issues involved in said cause of action, including evidence tending to show that plaintiff had not performed the contract, and did not, at the close of all the testimony, request the court to instruct the jury to return a verdict in its favor. *The case is unlike Lydia Cotton Mills v. Prairie Cotton Co.*, 156 Fed. 225, 84 CCA. 129, in which the court held that error might be assigned to the overruling of a motion for a non-suit made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, notwithstanding that the defendant thereafter took testimony, and did not renew the motion at the conclusion of all the evidence. *In that case the motion was based solely upon a proposition of law, and no issue or question of fact was involved, and the defendant's evidence had, and could have, no bearing upon it.*"

It is appellant's contention that this appeal comes squarely within this exception. Here there was no controverted question of fact for submission to a jury; there was nothing but a cold proposition of law, presented to the court. Furthermore, the defendant's evidence had, and could have, no bearing upon plaintiff's case. The complete record is before this court on review, from which it is clearly apparent that the evidence introduced by appellant could in no conceiv-

able way bolster up plaintiff's case, the weakness of which remained precisely as it was before defendant's evidence was put in. No possible interpretation can be placed upon the record to warrant a finding that defendant at any time waived its motion for a non-suit. Under these circumstances, then, the general rule does not apply.

A case directly in point on the contention we are making is *Citizens Trust & Savings Bank v. Falligan,* 4 Fed. (2nd) 481, heard in this court on April 6, 1925. Judge Gilbert, in accordance with his comment on the *Alaska Fisherman's* case, *supra,* discusses our point as follows:

> "The bank assigned error to the denial of its motion for a non-suit made at the close of the plaintiff's testimony. The ground of the motion was that there was no evidence to show that the bank participated in, or was a party to, the fraud. *The defendant in error contends that the bank waived its motion by its failure to request a peremptory instruction in its favor at the close of all the testimony. After the denial of the bank's motion, Barry testified in his own behalf; but the bank offered no further testimony and stood upon its motion.* The defendant in error cites cases holding that a motion for non-suit is waived where not renewed in a case where testimony is thereafter taken by the party so moving. In *Columbia Railroad Co. v. Hawthorne,* 144 U. S. 202, it was held that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, when the defendant has not rested his case can

> not be assigned as error. *It is true that the defendant bank in the present case at no time formally announced that it rested. But that circumstance is deemed of no importance. The controlling fact is that it did not waive its motion. Kinnear Mfg. Co. v. Carlisle,* 152 Fed. 933.
>
> "The question, therefore, is properly before us, whether or not there was evidence to go to the jury on the question of the bank's complicity in the fraud which was practiced upon the plaintiff."

It is to be noted that this opinion was in a case tried to a jury. The case at bar presents a much stronger exception. Here was a clear proposition of law with no controverted question of fact, triable to the court, and the evidence defendant put in could in no wise affect plaintiff's case.

Another case squarely in point is *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225. It is there stated, beginning at p. 233:

> "The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff * * * *. We do not think that the rule of practice laid down in *Grand Trunk Ry. Co. v. Cummings,* and in *Insurance Co. v. Crandall,* above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence, or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms * * * *. The construction of the contract as set forth above in this opinion be-

ing for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if the defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error * * * *.

"The motion of defendant was based solely upon a proposition of law, and no issue or question of fact was involved. We do not think, therefore, that any question in regard to the rule of practice referred to arises."

It is noted that in this case, as in the case at bar, "there was no issue of fact involved upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract plain in its terms." It is to be noted further that this very case is the one referred to by Judge Gilbert in his opinion in the *Alaska Fishermen's* case, *supra,* as being an exception to the general rule.

The latest case in point is that of *American State Bank v. Mueller Grain Co.,* 15 Fed. (2nd) 899, in which it is said:

"There was a motion for a directed verdict at the close of plaintiff's evidence. That, if not waived by subsequently calling the witness Stein-

ert for the defendant, is available here. We are of opinion that it was not waived * * * *.

"In *Grand Trunk Ry. Co. v. Cummings,* 106 U. S. 700, speaking of a motion made by defendant at the close of plaintiff's testimony, the court said: 'If he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, *in the absence of the defendant's testimony* on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.'

"In *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225, the court said: 'The reason for the principle laid down in the case last cited (*Grand Trunk*) is readily apparent, that, although the testimony offered by plaintiff may not in itself have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant subsequently offered may have had upon the issues involved. For, it frequently occurs in the trial of causes that the testimony of the defendant upon cross examination of witnesses, or disclosures otherwise made, has a tendency to strengthen rather than weaken plaintiff's case. It was, therefore, important that the defendant's testimony should be set out in the record, that the court might see and determine upon all of the testimony, as to whether or not the case should have gone to the jury.'

"The court held that the defendant might have assigned for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence under the circumstances there shown. In *Lancaster v. Foster,* 260 Fed. 5, the court held that an

> exception to denial of the motion for a requested verdict made at the close of plaintiff's case, is not waived by defendant by subsequent introduction of evidence, where such evidence is all in the record, and contains nothing which strengthens plaintiff's case. Petition for certiorari was denied in that case."

These cases, and not the cases in appellee's brief, set forth the law applicable on this appeal. Each of the cases cited by counsel for the Government applies the general rule to a case falling within the scope of that rule—a case where there is an issue of fact, and not solely a proposition of law—a case where the defendant's evidence was not before the court on appeal—or a case where the evidence offered by defendant affected plaintiff's case. Such cases are no authority for the case at bar.

We submit that defendant's motion for a non-suit was not waived; that there was no issuable question of fact involved; that the sole question was one of law; that with or without defendant's evidence it remained the same; that the question of the sufficiency of the evidence to sustain the judgment entered below is properly reviewable by this Honorable Court.

In conclusion it is respectfully submitted that the judgment should be reversed for the reason that there was no proof whatsoever that the surety was called; no proof of the judgment *nisi;* the uncontradicted evi-

dence affirmatively shows that the defendant fully complied with the terms of the bond, and that no default was made; that the only part of the seven charges brought against the defendant, which were by any chance covered by the bond, were dismissed prior to the alleged forfeiture; that the bond was discharged because the seven charges brought against the defendant were more and different than the charge covered by the bond; that the bond was discharged for failure to call the defendant within the time specified, and for failure to file a charge during the term specified in the bond; that the defendant's surety was released on failure of the Government to justify an indefinite continuance of the case from May 26, after a plea of guilty, to September 8, thereby unjustly prolonging the risk of the surety.

Respectfully submitted,

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